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COURTS AND LEGISLATION[1]

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Let me begin with a quotation:

"[There] is no doubt but that our law and the order thereof is over-confuse[d]. It is infinite and without order or end. There is no stable ground therein nor sure stay; but every one that can color reason maketh a stop to the best law that is before time devised. The subtlety of one serjeant shall [make] inert and destroy all the judgments of many wise men before time received. There is no stable ground in our common law to lean unto. The judgments of years be infinite and full of much controversy. . . . . The judges are not bound to follow them as a rule, but after their own liberty they have authority to judge, according as they are instructed by the serjeants, and as the circumstance of the case doth them move. And this maketh judgments and processes of our law to be without end and infinite; this causeth suits to be long in decision. Therefore, to remedy this matter groundly, it were necessary in our law to use the same remedy that Justinian did in the law of the Romans, to bring this infinite process to certain ends, to cut away these long laws, and by the wisdom of some politic and wise men institute a few and better laws and ordinances."[2]

Such are the words Starkey puts into the mouth of Reginald Pole in a dialogue submitted to Henry VIII. If in large part they

[1] Address delivered before the American Political Science Association at Buffalo. December 28, 1911. Note 13 has since been added.

[2] Maitland, *English Law and the Renaissance*, 42.

have a familiar sound, and need only a dress of modern English to pass for a clipping from a recent periodical, an emanation from the American legal muckraker, it is partly because the relation of judging to law-making is a perennial problem and partly because that time was (as the present is also) a period of legislation following upon one of common law. In a later period of legislative activity, after an ineffectual attempt to reform the law and procedure of England, Cromwell was forced to say, referring to bench and bar, "the sons of Zeruiah are too hard for us." In still a later period of legislation, the period of the legislative reform movement, Bentham was wont to say that the law was made by "Judge & Company"[3]—i.e., by the bench and bar—and to accuse the lawyer of chuckling "over the supposed defeat of the legislature with a fond exultation which all his discretion could not persuade him to suppress." Today the relation of courts to legislation has become a world-wide question, following the development of legislative law-making through modern parliaments. On the Continent, the last decade has seen the rise of a great juristic literature upon the subject. Whether, as in France, new demands are made upon old codes, which have acquired a settled gloss of doctrine and jurisprudence, or, as in Germany, the principles of a new code await juristic development at many important points, or, as in the United States, a rapidly growing body of written law is adjusting to a stable and none too flexible body of traditional principles, under one name or another, juridical method has become a chief subject of discussion. Even our problem of judicial power with respect to unconstitutional legislation has ceased to be local. Marbury vs. Madison has been cited and followed by a court of Roman Dutch lawyers in South Africa.[4] With the adoption of a written constitution, the subject has become acute in Australia and Australian courts and lawyers are insisting upon the American doctrine in the face of a decision of the privy council in England to the contrary.[5] If we bear in mind that the relation of courts to legisla-

[3] *Works* (Bowring edition) v, 369.

[4] Brown vs. Leyds, 14 *Cape Law Journal*, 94.

[5] Rex vs. Barger, 6 Com. L. R. 41, 63, 81. See Webb vs. Outrim [1907] A. C. 81.

tion is neither a new question nor a local question, we shall be able to look upon more than one aspect of the matter with greater equanimity.

According to the beautifully simple theory of separation of powers three wholly distinct departments have for their several and exclusive functions to make laws, to execute laws, to apply laws to controversies calling for judicial decision. It is a commonplace that a complete separation of this sort has never existed anywhere and that the lines, as we draw them in our constitutional law, are historical rather than analytical. But the theory itself, so far as it confines the judicial function to mere application of a rule formulated in advance by an extra judicial agency proceeds upon an eighteenth century conception of law and of law-making which we cannot accept today.

Jurists of the eighteenth century had no doubt that a system of law, complete in every detail, might be constructed for any country by any competent thinker by deduction from abstract principles. They thought of the legal system as a structure which might be built over again at pleasure in accordance with one's ideal of right. Hence their conception of legal science was a discovery and formulation of this ideal, as something unchangeable and independent of human recognition, whereby they might hand over to the legislator a model code, to the judge a touchstone of pure law, to the citizen an infallible guide to conduct. So long as men believed in this absolute natural law, they were justified in laying down that it was for the legislator to discover and enact this model code and for the judge simply to apply it. And even after they ceased to believe in it, two theories which had great currency served to keep alive the resulting conception of the judicial function. One was the tradition of absolute legal principles, discovered and applied by courts, but existing prior to and independent of all judicial decision. Laid down by Blackstone, this notion that judicial decisions were merely evidence of law, or of that part of the law not evidenced by statutes, was accepted as a fundamental proposition. Austin characterized it justly as "the childish fiction, employed by our judges, that judiciary or common law is not made by them, but is a miraculous something,

made by nobody, existing, I suppose from eternity, and merely declared from time to time by the judges."[6] Historically, it represents the Germanic conception of law, the "sighing of the creature for the justice and truth of his creator"[7] which, Heusler tells us, is to be found in every law book of the middle ages. Such a tradition, well established in the eighteenth century, lent itself at once to the juristic theory of that time and to the resulting theory of the judicial office. Moreover, it was reinforced presently from another quarter. After the historical jurists had overthrown the eighteenth century juristic theory, they acquiesced in a learned tradition on the Continent which confined historical study to the texts of the Roman law and they created a learned tradition in America which confined the jurist to the classical common law. Accordingly, ostensibly the judicial function remained purely one of application. Men differed only as to what was to be applied. To some it was the command of the sovereign, expressed normally in legislation. To others it was natural law, which might at any time be revealed as a whole to the legislator and promulgated in a code. To others it was the principles of the common law, evidenced by prior decisions or declared by statutes. To others it was the body of legal principles implicit in the sources to which the learned tradition confined historical study and derived therefrom by legal reasoning. In any event it was assumed that the judge in every sort of case merely applied a rule which had a prior independent existence.

A German writer has put the received theory thus: The court is an automaton, a sort of judicial slot machine. The necessary machinery has been provided in advance by legislation or by received legal principles, and one has but to put in the facts above and draw out the decision below. True, he says, the facts do not always fit the machinery, and hence we may have to thump and joggle the machinery a bit in order to get anything out. But even in extreme cases of this departure from the purely automatic, the decision is attributed, not at all to the thumping and joggling process, but solely to the machine.[8] It goes without saying that

[6] *Jurisprudence* (4 ed.), 655.

[7] *Institutionen des deutschen Privatrechts*, §1.

[8] Kantorowicz, *Rechtswissenschaft und Soziologie*, 5.

such a conception of the process of judicial decision cannot stand the critical scrutiny to which all legal and political institutions are now subjected. Men insist upon knowing where the preëxisting rule was to be found before the judges discovered and applied it, in what form it existed, and how and whence it derived its form and obtained its authority. And when, as a result of such inquiries, the rule seems to have sprung full-fledged from the judicial head, the assumption that the judicial function is one of interpretation and application only leads to the conclusion that the courts are exercising a usurped authority. The true conclusion is rather that our theory of the nature of the judicial function is unsound. It is a fiction, born in periods of absolute and unchangeable law. If all legal rules are contained in immutable form in holy writ or in twelve tables or in a code or in a received corpus juris or in a custom of the realm whose principles are authoritatively evidenced by a body of prior decisions, not only must new situations be met by deduction and analogical extension under the guise of interpretation, but the inevitable changes to which all law is subject must be hidden under the same guise. Today, when all recognize, nay insist, that legal systems do and must grow, that legal principles are not absolute, but are relative to time and place, and that juridical idealism may go no further than the ideals of an epoch, the fiction should be discarded. The analytical jurists did a great service to legal science when they exposed this fiction, though their conclusion that a complete code should be enacted in order to put an end to the process of judicial law-making shows that they saw but half of the truth. For the application of law is not and ought not to be a purely mechanical process. Laws are not ends in themselves; they are means toward the administration of justice. Hence within somewhat wide limits courts must be free to deal with the individual case so as to meet the demands of justice between the parties. Any considerable narrowing of these limits, any confining of the judicial function by too many hard and fast rules soon defeats the purpose for which law exists. Application of law must involve not logic merely but a measure of discretion as well. All attempts to eradicate the latter element and to make

the law purely mechanical in its operation have ended in failure. Justice demands that instead of fitting the cause to the rule, we fit the rule to the cause. "Whoever deals with juristic questions," says Zitelmann, "must always at the same time be a bit of a legislator;"[9] that is, to a certain extent he must *make* law for the case before him.

Our first step, then in considering the relation of courts to legislation, must be to analyze the judicial function.

Judicial decision of a controversy, the facts being ascertained, has been said to involve three steps: (1) finding the rule to be applied, (2) interpreting the rule, (3) applying the rule to the cause. The first process may consist merely in laying hold of a prescribed text of code or statute, in which case it remains only to determine the meaning of the rule and to apply it. More commonly the first process involves choice among competing texts or choice from among competing analogies, so that the several rules must be interpreted in order that intelligent selection may be made. Often such interpretation, using the term to mean a genuine interpretation, shows that no existing rule is adequate to a just decision and it becomes necessary to provide one for the time being. The rule so provided may or may not become a precedent for like cases in the future. In any event, this process has gone on and still goes on in all systems of law, no matter what their form and no matter how completely in their juristic theory they limit the function of adjudication to the purely mechanical.

Perhaps the classical instance of the process referred to is to be found in article 5 of the French civil code. That article reads as follows: "Judges are forbidden, when giving judgment in the cases which are brought before them, to lay down general rules of conduct or decide a case by holding it was governed by a previous decision." Its purpose was, as we are told by an authoritative commentator, to prevent the judges from forming a body of case law which should govern the courts and to prevent them from "correcting by judicial interpretations, the mistakes made

[9] Zitelmann, *Die Gefahren des bürgerlichen Gesetzbuches für die Rechtswissenschaft*, 19.

in the [enacted] law."[10] After a century of experience in the endeavor to carry out this purpose, French jurists are now agreed that the article in question has failed of effect. Today the elementary books from which law is taught to the French students, in the face of the code and of the Roman tradition, do not hesitate to say that the course of judicial decision is a form of law.[11]

All of the three steps above described are commonly confused under the name of interpretation, because, in primitive times, when the law is taken to be God-given and unchangeable, the most that may be permitted to human magistrates is to interpret the sacred text. The analytical jurists first pointed out that finding a new rule and interpreting an existing rule were distinct processes, and Austin distinguished them as spurious interpretation and genuine interpretation respectively, since his belief in the possibility of a complete body of enacted rules, sufficient for every cause, led him to regard the former as out of place in modern law.[12] Indeed he was quite right in insisting that spurious interpretation *as a fiction* was wholly out of place in legal systems of today. But experience has shown, what reason ought to tell us, that this fiction was invented to cover a real need in the judicial administration of justice and that the providing of a rule by which to decide the cause is a necessary element in the determination of all but the simplest controversies. More recently the discussions over the juridical handling of the materials afforded by the modern codes has led Continental jurists to distinguish application of rules to particular causes from the more general problem of interpretation. Indeed, under the influence of the social philosophical and sociological jurists, who have insisted that the essential thing in administration of justice according to law is a reasonable and just solution of the individual controversy,

[10] Laurent, *Droit civil Français*, i, §§250–262.

[11] Baudry-Lacantinerie, *Précis de droit civil* (8 ed.) preface; Capitant, *Introduction à l'Étude du droit civil* (3 ed.) 30 ff. See also Demogue, *Notions fondamentales du droit privé*, 216 ff.; Esmein, La jurisprudence et la doctrine, *Revue trimestrielle de droit civil*, i, 1; Saleilles, Le code civil et la méthode historique, *Livre du centennaire du code civil*, i, 97; Gény, *Méthode d'interprétation*, §§ 39–59.

[12] *Jurisprudence* (4 ed.) 1026–1036. See my paper, "Spurious Interpretation," 7 *Columbia Law Rev.* 379.

application of law has become the central problem in present-day legal science.

Given the three steps in the decision of causes, as courts now proceed, namely, finding of rules, interpretation of rules, and application to particular controversies of the rules when found and interpreted, let us consider the relation of the courts to legislation with reference to each.

It has been a favorite notion of legislators that the finding of law could be reduced to a simple matter of genuine interpretation; that a body of enacted rules could be made so complete and so perfect that the judge would have only to select the one made in advance for the case in hand, interpret it and apply it.[13] As has been said, this was the eighteenth century idea. Thus in the code of Frederick the Great the "intention was that all contingencies should be provided for with such careful minuteness that no possible doubt could arise at any future time. The judges were not to have any discretion as regards interpretation, but were to consult a royal commission as to any doubtful points, and to be absolutely bound by their answer. This stereotyping of the law was in accordance with the doctrines of the law of nature, according to which a perfect system might be imagined, for which no changes would ever become necessary, and which could, therefore, be laid down once for all, so as to be available for any possible combination of circumstances."[14] Bentham and Austin, who saw clearly enough that the doctrine of natural law of the eighteenth century was untenable, none the less had the same idea of the possibility of a perfect code, self-sufficient and adequate to every cause. Accordingly Austin named as a de-

[13] "These decisions leave the legitimate business of the country in condition of uncertainty. . . . . This condition I have met by a bill which I have introduced in the Senate. It enumerates in plain English every known practice and expedient through which combinations have stifled competition, and prohibits anyone from engaging in them." Senator La Follette in *American Magazine*, July, 1912.

[14] Schuster, The German Civil Code, 12 *Law Quarterly Rev.* 17, 22. As to this notion of authentic interpretation, the maxim *eius est interpretari legem cuius est condere* and the break down of non-judicial interpretation by legislative bodies and royal commissions, see Gény, *Méthode d'interprétation*, §§40–45.

fect of the French civil code what has proved to be the chief source of its success, namely, that it was not intended to be complete but was intended to be supplemented and explained by various subsidia.[15]

As we know, the historical school overthrew the notion that there could be a complete and final legislative statement of the law. Unhappily the historical jurists went too far in the opposite direction. They assumed that conscious human effort to shape and so to improve the law was futile. They conceived that the law developed through the development of the genius of a people and its gradual expression in legal institutions. Hence they took it to be the duty of the jurist to study the course of this development and to trace its effects in existing legal systems, but in no wise to attempt to interfere therewith, since to essay conscious law-making was to attempt the impossible. For many reasons this theory became very popular in America, and to a large extent it still holds its ground with us, after it has been rejected elsewhere in consequence of the rise of the social philosophical jurists. Thus we have two conflicting theories of the relation of courts to law-making. On the one hand, the older analytical theory, heir in this respect to the eighteenth century, holds that a complete legislative statement of the law upon any subject may be made in advance, and that judicial law-making is abnormal and due only, so far as it may be justified, to defects in the legislative prevision. On the other hand, the historical theory regards such legislative attempts as useless, as attempts to make what cannot be made, and hence looks upon development of the law by juristic speculation and judicial decision as the normal and on the whole the only practicable method. Neither of these theories expresses the whole truth. But the rise of modern legislation and resulting imperative notions of law serve to keep alive the former, while the exigencies of administering the modern codes upon the Continent and experience of applying modern statutes in England and America serve to keep alive the latter, in one form or another, as a tenet of the legal profession. For

[15] *Jurisprudence* (4 ed.), 695.

instance, it is justly thought a merit of the new German Civil Code that it makes no attempt to be a perfect code in the eighteenth century sense. But there are German expositors of the code who object to its generality and to the margin for development which it leaves and accuse it of being a mere institutional textbook.[16]

In truth the changed attitude toward legislation involved in the break-down of Savigny's historical school, much as it is to be welcomed in that it gives us much needed faith in the efficacy of effort in improvement of the law, is bringing about a return to absolute theories of law-making which in more than one respect is unfortunate. It has been said truly that the activity of legislatures is a fundamental fact of modern law. Demos will legislate, and any theory that seeks to put a check upon this activity will dash in vain against obstinate facts. But it is no less true that much if not most of this legislative activity will prove futile, as most of it has proved in the past, so long as it proceeds upon the assumption that legislators may lay out a full and complete scheme in advance, which will suffice for all controversies, so long as it assumes that the general principles of the law and the rules and doctrines of the legal system into which the legislative enactment is to be fitted and in which it must take its place may be neglected, and so long as it proceeds upon the idea that arbitrary expressions of the sovereign will may be given the quality of law by a prefatory "be it enacted." A lesson of legal history which must be learned both by legislators and by courts is that the law-maker must not be over-ambitious to lay down universal rules.

Since the fundamental idea of law is that of a rule or principle underlying a series of judicial decisions, it is obvious that the power of finding the law, which a tribunal must be allowed to exercise, is to be governed by some sort of system, or we shall have a personal rather than a legal administration of justice. The first conscious attempt to provide such a system is usually

[16] Endemann, *Lehrbuch des bürgerlichen Rechts*, i, §5. See Crome, *System des deutschen bürgerlichen Rechts*, i, §§9, 11; Kohler, *Lehrbuch des bürgerlichen Rechts*, i, §1.

a complete scheme of legislation. But such schemes are soon outgrown and are never wholly sufficient. Hence three purely juristic methods of systematizing the judicial finding of law have arisen. (1) First we may put what has been called a jurisprudence of conceptions. Certain fundamental conceptions are worked out from traditional legal principles, and the rules for the cause in hand are deduced from these conceptions by a purely logical process. The merit of this method is that it leads to certainty, and whenever, as in the nineteenth century, the demands of business and of property are paramount, this method is the prevailing one. (2) A second method is to take the rules of a traditional system or the sections of a legislative system as premises and to develop these premises in accordance with some theory of the ends to be met or of the relation which they should bear, when applied, to the social conditions of the time being. Just now Continental legal literature is full of suggestions as to the manner in which such a method should be worked out. (3) A third method is the purely empirical one of our Anglo-American law; as Mr. Justice Miller put it, the process of judicial inclusion and exclusion. This method, in appearance crude and unscientific, is none the less justified by its results. It is, in truth, the method of the natural scientist, of the physician and of the engineer, the method of trial-hypothesis and confirmation. The tentative results of *a priori* reasoning are corrected continually by experience. A cautious advance is made at some point. If just results follow, the advance goes forward and in time a rule is developed. If the results are not just, a new line is taken, and so on until the best line is discovered. With all its defects, this method has stood the test of use better than any other. Speaking of this method and of its results in English law, Kohler, who must be pronounced the leader among modern jurists says: "Their science does not go beyond the few necessary beginnings, yet their administration of law far surpasses ours."[17]

If judicial finding of law cannot be obviated by any complete scheme of legislation and may be systematized sufficiently by

[17] Geleitwort to Rogge, *Methodologische Vorstudien zu einer Kritik des Rechts*, iii.

known juristic methods, it would seem that legislation ought to seek chiefly to provide new and better premises from which courts may proceed rather than to tie the courts down rigidly by a mass of rules. This providing of new and better premises is a possible task and a needed one in all periods of transition. The slow growth of the law by judicial inclusion and exclusion and discovery of the sound rule at the expense of many litigants becomes intolerable in such periods. At many points a more rapid adjustment of the legal system to the needs of the community becomes imperative. Moreover, it happens too often in our Anglo-American case law that through over-ambition of our courts to lay down universal rules our empirical method is replaced in many portions of the legal system by a jurisprudence of conceptions. In such cases, new premises may be required because society cannot await the gradual shifting process which would otherwise bring about a readjustment of the law. But two points are to be observed in this connection.

In the first place, the legislator must bear in mind that his enactment will not stand alone. It must take its place in and become a part of an entire legal system. Hence he must not neglect the relation which his statute will bear to the general body of the law. Rules cannot stand alone in a legal system. So long as human foresight is finite and the variety of human actions infinite, legal reason must be the measure of decision of a great part of the causes that come before courts. This legal reason, exercised in one of the three ways we have considered, postulates a system of rules or principles. Disturbance of this system produces corresponding disturbance of the course of legal reasoning, and sooner or later the disturbing element yields to the general system or else the system gives way thereto. In any event, nothing has so profound an effect upon the practical workings of an enactment as its relation to the legal system into which it is to be set and the mode in which its adjustment thereto has been studied and provided for. This is a matter of much more moment than provision for every detail of application that may be foreseen.

The second point to observe is that this legitimate function

of judicial adjustment of legislation to its surroundings in the legal system is liable to abuse and has been abused in American law in the immediate past. The old law and the new element ought to be and in the end must be made to accord in a legal system. But this does not mean that the new element is to be judged with suspicion, to be held down rigidly to the mere letter of its provisions, and to be distorted by the reading into it of all the dogmas of the old law not inconsistent with its express terms. Unhappily a tendency of this sort was manifest at one time and has not wholly disappeared. Many things combined to produce such a tendency in nineteenth century American law; the poor quality of much of our state legislation, the analytical theory that law is made and its American form that law is what the courts decide it to be, the relations of judge and legislator in a system in which the judiciary in finding the law may test the validity of statutes by constitutional provisions, the traditions of a legal system which preserved many memories of the Germanic conception of a body of rules beyond reach of human change, and above all a notion of the finality of common-law doctrines derived in part from the Germanic tradition and in part from the later conception of natural law, and fortified by the doctrine of the historical school as to the futility of conscious law-making. Most of the friction between courts and people has been due to this notion of the finality of the law on the one hand and the notion of the finality of legislative power on the other hand.

Let us look at this feature of the relation of courts to legislation more closely.

Settled habits of juristic thought are characteristic of American legal science. Our legal scholarship is chiefly historical. Our professional thinking upon juristic subjects is almost wholly from the point of view of eighteenth century natural law. In either event, it begins and ends substantially in Anglo-American case law. Understand me, I do not for a moment underrate this inheritance of judicial experience in the adjustment of individual relations and disposition of concrete disputes. But I deny that it contains anything beyond such experience in any other sense than all experience may be made to disclose principles of action.

Yet our jurists of both schools have claimed much more for it. It has been shown more than once that our historical school has given us a natural law upon historical premises. It has made the fundamental conceptions of our traditional case law into fundamental conceptions of all legal science. Thus it has set up a fixed, arbitrary, external standard by which all new situations and new doctrines are to be tested. This school has had an almost uncontested supremacy in our legal scholarship. In the profession at large and in the law schools dominated by the practitioner, substantially the same result in juristic thinking is reached in another way. Except as they have come from the halls of a few of our great law schools, lawyers and judges have been trained to accept the eighteenth century theory of natural law. Until a date comparatively recent, all legal education, whether in school or office, began with the study of Blackstone. Probably all serious office study begins with Blackstone, or some American imitator today. Our latest and most pretentious institutional book lays down the natural-law conception without a hint that any other might be tenable. Some law schools still make Blackstone the first subject of instruction. In others, Blackstone is a subject of examination for admission or of prescribed reading after admission, or there are courses in so-called elementary law, in which texts reproducing the juristic theories of the eighteenth century are the basis of instruction. Thus scholar and lawyer have concurred in what became for a time a thorough-going conviction of the American lawyer, that the doctrines of the common law are part of the universal jural order. When he spoke of law, he thought of these doctrines. He held that constitutions and bills of rights are declaratory of them. He construed statutes into accord with them. Through the power of the courts over unconstitutional law-making, he forced them upon modern social legislation. When to use the words of Bracton and of Coke, he reminded the sovereign people that it ruled under God and the law,[18] he meant that these doctrines which were conceived of as going back of all constitutions and beyond the reach of

[18] *Prohibitions del Roy*, 12 Rep. 63.

legislation, were to be the measure of state activity. But the fundamental conceptions of Anglo-American case law are by no means those of popular thought today. Being alien in many particulars to current notions of justice and often out of touch with the economic and social thinking of the time, it is not likely that these principles would be acquiesced in wholly even if there were no positive force to counteract them. Such a force there is. For the popular theory of sovereignty, what one may call the classical American political theory, is quite as firmly rooted in the mind of the people as the eighteenth century theory of law is rooted in the mind of the lawyer. The layman is taught this political theory in school, he reads it in the newspapers, he listens to it on the Fourth of July and from the stump and from Chautauqua platforms, and he seldom or never hears it questioned. In consequence, he is as thoroughly sure of it as is the lawyer of his juristic theory. If the lawyer is moved to stigmatize all that does not comport with his doctrine as lawlessness, the people at large are moved to stigmatize all that does not comport with their theory as usurpation.

While the lawyer believes that the principles of law are absolute, eternal, and of universal validity, and that law is found, not made, the people believe no less firmly that it may be made and that they have the power to make it. While to the lawyer the state enforces law because it is law, to the people law is law because the state, reflecting their desires, has so willed. While to the lawyer law is above and beyond all will, to the people it is but a formulation of the general will. Hence it often happens that when the lawyer thinks he is enforcing the law, the people think he is overturning the law. While the lawyer thinks of popular action as subject to legal limitations running back of all constitutions and merely reasserted, not created, thereby, the people think of themselves as the authors of all constitutions and limitations and the final judges of their meaning and effect. This conflict between the lawyer's theory and the politician's theory weakens the force of law. The lawyer's theory often leads him to pay scant attention to legislation or to mold it and warp it to the exigencies of what he regards as the real law. But to those

who do not share his theory, this appears as a high-handed overriding of law, and the layman, laboring under that impression, is unable to perceive why the lawyer should have a monopoly of that convenient power. On the other hand, the people's theory that law is simply a conscious product of the human will tends to produce arbitrary and ill-considered legislation impossible of satisfactory application to actual controversies.

Hence, I take it, absolute theories, derived from the eighteenth century are the principal source of friction in the relation of courts to legislation. Already the causes of this friction are disappearing, and the resultant difficulties in our legal system are going with them. More careful legislation, proceeding upon better lines and based upon better understanding of what legislation may achieve and should attempt on the one hand and the disappearance on the other hand of the notion of the finality of the common law are now things, if not of the present, certainly of the immediate future. And at the same time the judicial attitude toward legislation has changed visibly. Comparing the reports of the decade from 1880 to 1890 with the reports of today, this change becomes very striking, and a progressive liberalization is manifest as one looks over the decisions from 1890 to 1910. On the whole the movement is going forward more rapidly in the courts than in the legislatures, though some states here are conspicuous exceptions. Not a little modern social legislation, as it is too often enacted, will call for the highest powers of the strongest judges that can be put upon the bench, if we are to make it effective as part of a legal system.

Turning now to interpretation, I must make it clear at the outset that I refer to genuine interpretation, to a genuine ascertainment of the meaning of the legislative provision. This problem, however, is so closely connected with the more difficult one of application of the provision to the cause in hand that to some extent we may look at them together. In the past the whole complex of problems, finding a rule to apply, interpreting the rule when found, and applying it, has been called interpretation. This has led to an impression that *all* interpretation involves the legislative and personal element which belongs only to the finding

of law. Hence the present popular demand that our courts go to the extreme in spurious interpretation of constitutional provisions while at the same time complaint is made that statutes are nullified by the ordinary process of finding and applying the law. We cannot keep before us too clearly that finding the law —if you will, judicial law-making—is one thing, and true interpretation quite another. In dealing with statutes, since from the nature of the case all causes could not be foreseen, this finding the law or judicial law-making or spurious interpretation is necessary unless we would have the court decide by throwing dice or casting lots. But in constitutional law, where the issue is simply whether the legislative act must yield to the supreme law of the land embodied in a constitutional provision, the question can only be one of genuine interpretation. In the first decision upon the legal tender act, indeed, and in other cases occasionally, implied limitations upon legislative power have been derived by analogy. But such implied limitations, if they exist, must be implied in fact. The idea of a prescriptive constitution, of principles running back of all governments of which bills of rights are but declaratory, is only another phase of the idea of natural law, and in its application means simply the finality of an ideal development of the fundamental principles of the common law. In many of our state courts this idea has been the bane of constitutional decisions upon provisions of the bills of rights. Indeed it has some warrant in the notions of those by whom the bills of rights were framed, and if these were statutory provisions, the position that they might be extended analogically as being declaratory of common law doctrines might be well taken. For our bills of rights represent the eighteenth century desire to lay down philosophical and political and legal charts for all time, proper enough in men who believed they had achieved finality in thought in each connection. The first period of our constitutional law was under the influence of these ideas. But legislatures at that time were willing to be guided by the prescribed charts and would have conformed thereto had there been no such constitutional provisions. The chief complaint during this period was that the courts extended the possibilities of governmental action by in-

terpretation; for example, that they allowed the federal government to do much which it was denied the constitution had granted thereto. Later, a period of vigorous legislation upon social subjects began and the complaint changed. Now it is urged that the interpretation of courts is too narrow, that legislatures, state and national, are shorn of the powers that belong to them. What has happened is this. Experience has shown, as judicial experience has always shown, the unwisdom of hard and fast enactment. The eighteenth century political and legal charts have been found unsuitable. We have found that after all a bill of rights was wisely omitted from the original draft of the federal constitution. Such provisions were not needed in their own day, they are not desired in our day. It is true they have been aggravated to some extent by taking them to be declaratory and then reasoning from assumed first principles instead of applying the provisions themselves. But that practice has been disappearing with the wane of the idea of the finality of the common law, and the current reports show that with a few conspicuous exceptions, both federal and state tribunals are definitely rejecting it. Consequently it is a misfortune that at the very time when spurious interpretation is thus losing its only foothold in judicial interpretation of constitutions, there should be a strong public demand for elimination or mitigation of undoubted restrictions by a process of spurious interpretaton.

The fiction involved in calling the judicial process of finding the law by the name of interpretation leads to just such mischiefs. It gives rise to an aversion to straightforward change of any important legal doctrine. The cry is *interpret it.* But such interpretation is spurious. It is legislation. And to interpret an obnoxious rule out of existence rather than to meet it fairly and squarely by legislation is a fruitful source of confusion. Yet the bar are trained to it as an ancient common law doctrine, and it has a great hold upon the public. Hence if the law does not work well, says Bentham, with fine sarcasm, "it is never the law itself that is in the wrong; it is always some wicked interpreter of the law that has corrupted and abused it."[19] Thus an unnec-

[19] *Fragment on Government,* xvii.

essary strain is imposed upon our judicial system and courts are held for what should be the work of the legislature.

With respect to legislation proper, however, there is much yet to be done in the development of a better system of interpretation and application. Vandereycken finds three stages in the development of judicial interpretation.[20] (1) The literal stage, is one in which the exact words taken literally are made the sole measure. (2) In the logical stage the law is taken to be constituted by the will of the law-giver and respect for this will takes the place of the respect for the formula which governed the preceding period. Most of our common law interpretation belongs to this stage. We conceive of genuine interpretation as an attempt by logical methods to ascertain the will of the author of the law. (3) In the positive stage, the law is regarded not so much as something proceeding from the will of the law-giver as something proceeding from society through him; as being the product of economic and social forces working through him and finding expression in his words. Hence the text and the context is no longer held to be an all-sufficient guide. Nor are the circumstances attending enactment held conclusive. Above all things, it is held, regard must be had to the exigencies of social life, to the social ends to be served, to the effect of the different possible interpretations or applications upon the community to be governed thereby. Kohler, one of its pioneer advocates, has applied this method to the new German code, and his exposition deserves to be quoted. He says:

"Thus far we have overlooked most unfortunately the sociological significance of law-making. While we had come to the conviction that it was not the individual who made history but the totality of peoples, in law-making we recognized as the efficient agency only the person of the law-maker. We overlooked completely that the law-maker is the man of his time, thoroughly saturated with the thoughts of his time, thoroughly filled with the culture that surrounds him, that he works with the views and conceptions which are drawn from his sphere of culture, that he speaks with words that have a century of history behind them

[20] *L'Interprétation juridique*, §§236 ff.

and whose meanings were fixed by the sociological process of a thousand years of linguistic development, and not through the personality of the individual. The opinion that the will of the law-maker is controlling in construing legislation is only an instance of the unhistorical treatment of the facts of the world's history and should disappear entirely from jurisprudence. Hence the principle: rules of law are not to be interpreted according to the thought and will of the law-maker, but they are to be interpreted sociologically, they are to be interpreted as products of the whole people, whose organ the law-maker has become."[21]

It is significant that the Juristentag in Germany has already undertaken legal-sociological inquiries with respect to the social effect of existing laws as the basis of proposed legislation, and that at least one German professor of law has for some time maintained a seminar devoted to studies of this type.[22]

As has been said our classical common law interpretation is of the second type. But something very like sociological interpretation has begun in this country. The briefs submitted by Mr. Brandeis in the case of Muller vs. Oregon and in the case involving the Illinois statute as to hours of labor of women show what may be achieved in this direction. The recent decision of the supreme court of Wisconsin on the workmen's compensation law of that State shows that the good sense of our courts is leading them to develop some such method for themselves.

With respect to interpretation, then, I take it our tasks are (1) to rid ourselves here also of absolute theories, and in particular of the remains of the dogma of finality of the common law, (2) to repeal what ought to be repealed directly and straightforwardly and not store up mischief for the future by demanding indirect repeal by spurious interpretation, (3) above all to develop a sociological method of applying rules and thence if need be of developing new ones by the judicial power of finding the law.

A radically different view is finding favor with many laymen

[21] *Lehrbuch des bürgerlichen Rechts*, i, §38.

[22] Kantorowicz, *Rechtswissenschaft und Soziologie*, 9; Ehrlich, Die Erforschung des lebenden Rechts, *Schmoller's Jahrbuch für Gesetzgebung, Gewaltung und Volkswirthschaft*, xxxv, 129.

today and has been advocated by professors of government and political science. One of the latter has suggested recently that the power of interpretation should be taken from the courts and given to some executive body in supposed closer touch with the popular will, thus confining the courts to the task of applying the prescribed and interpretated rule. Perhaps enough has been said to show that interpretation apart from decision is impracticable, that it is futile to attempt to separate the deciding function from the interpretating function. But if the mere function of genuine interpretation were to be set off—and of course *spurious* interpretation is law-making and on theoretical grounds is no more proper for an executive commission than for a court and on practical grounds is obviously better exercised concretely than abstractly—how little should we accomplish. Professor Gray has put the matter very well thus: "A fundamental misconception prevails and pervades all the books as to the dealing of the courts with statutes. Interpretation is generally spoken of as if its chief function was to discover what the meaning of the legislature really was. But when the legislature has had a real intention, one way or another on a point, it is not once in a hundred times that any doubt arises as to what its intention was. If that were all that the judge had to do with the statute, interpretation of the statutes, instead of being one of the most difficult of a judge's duties would be extremely easy. The fact is that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind had the point been present."[23]

Moreover this very experiment was tried in the code of Frederick the Great and failed utterly as was to be expected. For why should we hope that the executive commission would possess more foresight than the legislature? It is a lesson of all legal

[23] *Nature and Sources of Law*, §370.

history that the most we may achieve in advance is to lay down a premise or a guiding principle and that the details of application must be the product of judicial experiment and judicial experience.

In a much-quoted case of the fourteenth century, counsel reminded the court of common pleas that if it did not follow its own decisions no one could know what was the law. One of the judges interposed the suggestion that it was the will of the justices. "Nay," corrected the chief justice, "law is reason."[24] In this antithesis between will and reason we have the root of the matter. Mere will, as such, has never been able to maintain itself as law. The complaint of our sovereign peoples that their will is disregarded must be put beside the querulous outburst of James I, "Have I not reason as well as my judges?"[25] the attempt of Frederick the Great to put all interpretation of law in the hands of a royal commission, and the futile attempt of Napoleon's code to prevent the growth of a judge-made law. There is no device whereby the sovereign, whether King Rex or King Demos may put mere will into laws which will suffice for the administration of justice.

To sum up, I think the difficulties involved in the relation of courts to legislation grow out of (1) over-minute law-making which imposes too many hard and fast details upon the courts, (2) crude legislation, which leaves it to courts to work out what the legislature purported to do but did not, (3) absolute theories, both of law and of law-making, which lead both courts and legislatures to attempt too many universal rules, to attempt to stereotype the ideas of the time as law for all time, and have led courts at times to enforce too strongly the doctrines of the traditional system, at the expense of newer principles, and finally (4), by no means least, insufficient attention to the problem of enforcement of rules after they are made. Enforcement and application are the life of law. But we have spent our whole energies upon making rules and have seemed to rely on faith that they would vindicate themselves. More than anything else, atten-

[24] Langbridge's case, Y.B. 19 Ed. III, 375.

[25] *Prohibitions del Roy*, 12 Rep. 63.

tion to procedure and to the enforcement of rules and their application in practice will relieve the present tension. The Puritan ideal of judicial machines bound down by a multitude of detailed rules has proved inadequate. If legal history may be vouched, the way out lies in strong courts with full powers of doing justice, guided by principles furnished by the law-giver, but not hampered by an infinity of rules, the full effect whereof in action no one can hope to foresee.